

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE GHK COMPANY, L.L.C.
and GHK/POTATO HILLS LIMITED
PARTNERSHIP,

Defendants.

Civil Action No. _____

The United States of America, by and through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency (EPA), alleges as follows:

1. This is a civil action for injunctive relief and penalties brought pursuant to section 309(b) and (d) of the Clean Water Act (the “Act” or “CWA”), 33 U.S.C. § 1319(b) and (d), against The GHK Company, L.L.C. and GHK/Potato Hills Limited Partnership (collectively referred to herein as “GHK” or “Defendants”), for the discharge of pollutants without a permit in violation of sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311, 1344(a), and for failure to respond fully to a request for information regarding potential violations, issued by EPA pursuant to section 308 of the Act, 33 U.S.C. § 1318.

2. Plaintiff seeks both injunctive relief and civil penalties for Defendants' violations of the CWA. Specifically, in this action, the United States seeks (1) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of sections 301(a) and 404 of the CWA, 33 U.S.C. 1311(a), 1344; (2) to require GHK, at its own expense and at the direction of the EPA, to restore and/or mitigate the harm caused by their unlawful activities; (3) to require GHK to respond fully to the § 308 Information Request issued by EPA, and (4) to require GHK to pay civil penalties to the United States as provided in 33 U.S.C. § 1319(b) and the inflation penalty adjustment provision of the Debt Collection Improvements Act of 1996, 31 U.S.C. § 3701.

JURISDICTION, AUTHORITY AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, as well as section 309(b) of the CWA, 33 U.S.C. § 1319(b).

4. Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519 and section 506 of the Act, 33 U.S.C. § 1366, and in the Administrator of the EPA pursuant to section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b).

5. Notice of the commencement of this action has been given to the State of Oklahoma in accordance with section 309(b) of the Act, 33 U.S.C. § 1319(b) and section 404(s) of the CWA, 33 U.S.C. § 1344(s).

6. Venue is proper in the Eastern District of Oklahoma pursuant to 28 U.S.C. §§ 1391(b)-(c) and section 309(b) of the CWA, 33 U.S.C. § 1319(b), because Defendants do business in this judicial district.

PARTIES

7. Plaintiff is the United States of America, acting on behalf of the U.S. EPA.

8. Defendants are incorporated under the laws of Oklahoma and, at all relevant times, were engaged in the business of gas exploration and production in the Latimer, Le Flore, and Pushmataha counties in the State of Oklahoma.

9. Defendants are “persons” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

10. Defendants owned or operated the subject natural gas production facilities at all relevant times.

STATUTORY AND REGULATORY FRAMEWORK

11. The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. Section 101(a) of the Act, 33 U.S.C. § 1251(a).

1. POINT SOURCE DISCHARGE PROVISIONS

12. Under section 301(a) of the Act, 33 U.S.C. § 1311(a), it is unlawful for any person to discharge any pollutant from a point source to waters of the United States, except with the authorization of, and in compliance with, certain sections of the Act, including sections 402 and 404 of the Act, 33 U.S.C. §§ 1342 and 1344.

13. Section 502(6) of the CWA, 33 U.S.C. § 1362(12), defines “pollutant” to include:

“dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”

14. Where the pollutant discharged is dredged or fill material, section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

15. With respect to other types of pollutants, section 402 of the Act, 33 U.S.C. § 1342, established a National Pollutant Discharge Elimination System (“NPDES”) permit program to control discharges from point sources into waters of the United States. In accordance with this section, an NPDES permit is required to be obtained from the EPA, or a state authorized to administer the NPDES program, prior to the discharge of pollutants from point sources into waters of the United States.

16. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

17. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 C.F.R. § 328.3(a)(1), (2), (3), (5) and (7), and 40 C.F.R. §§ 122.2 and 232.2 define “waters of the United States” to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) all interstate waters; (iii) all other waters, such as intrastate lakes,

rivers, streams, sloughs or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; and (iv) wetlands adjacent to such waters or their tributaries.

18. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

19. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include “an individual [or] corporation.”

2. STORM WATER DISCHARGE PROVISIONS

20. Pursuant to section 402, 33 U.S.C. § 1342, the EPA promulgated regulations setting forth the permit application requirements for storm water discharges. 55 Fed. Reg. 48,063 (Nov. 16, 1990). These regulations are codified at 40 C.F.R. § 122.26 (“storm water regulations”).

21. Both section 402(p)(2)(B) of the Act, 33 U.S.C. § 1342(p)(2)(B), and 40 C.F.R. § 122.26 require that an NPDES permit be obtained for storm water discharges that are “associated with industrial activity.” 40 C.F.R. § 122.26(a)(iii).

22. In 40 C.F.R. § 122.26(b)(14), EPA defined the term “storm water discharge associated with industrial activity” to include storm water discharges from “construction activity including clearing, grading, and excavation” activity, that results in a disturbance of five or more acres of total land area. 40 C.F.R. § 122.26(b)(14)(x).

23. Pursuant to 40 C.F.R. § 122.26(c), dischargers of storm water associated with industrial activity are required to apply for an individual NPDES permit or to seek coverage under a storm water general permit.

24. To facilitate the process of complying with the NPDES requirements at construction sites in EPA's Region 6, EPA has issued an "NPDES General Permit for Storm Water Discharges from Construction Activities in Region 6," which authorizes certain discharges of storm water associated with construction activities, and expressly applies to "oil and gas construction in the State of Oklahoma." 63 Fed. Reg. 36490 (July 6, 1998) (hereinafter "the General Permit"). The General Permit became effective on July 6, 1998.

25. Pursuant to the General Permit, owners and operators of sites at which construction activity disturbs five or more acres and may result in "the discharge of storm water associated with construction activity" must obtain coverage under either the General Permit or an individual NPDES permit to comply with the Act, and must develop and implement a Storm Water Pollution Prevention Plan. Section 402 of the Act, 33 U.S.C. § 1342; 40 C.F.R. Part 122; 63 Fed. Reg. 36490.

26. Part I.C. of the General Permit states that, in order for storm water discharges from a construction site to be authorized, the discharger must first submit a Notice of Intent in accordance with the form and content requirements set forth in the Permit itself.

27. In addition, any person subject to the permit is required to develop a storm water pollution prevention plan ("SWPPP"), which sets forth a plan for minimizing and eliminating to the extent feasible discharges of storm water associated with construction activities. Central to the SWPPP are the best management practices, which are designed to eliminate to the extent feasible the migration of pollution from the site into the nation's waters. These practices include measures to prevent erosion and measures to capture sediment before it leaves the site. The permit also imposes additional requirements, including those for inspection

of the site during construction, maintenance of the SWPPP, and final stabilization of the site followed by termination of permit coverage.

3. INFORMATION GATHERING PROVISIONS UNDER THE CWA

28. Section 308 of the CWA, 33 U.S.C. § 1318, authorizes the Administrator to “require the owner or operator of any point source to (i) establish and maintain such records, (ii) makes such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents . . . and (v) provide such other information as he may reasonably require.”

4. ENFORCEMENT PROVISIONS OF THE CWA

29. Pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b), plaintiff may commence a civil action for appropriate relief, including a temporary or permanent injunction, when any person is in violation of sections 301, 308, or 404 of the CWA, 33 U.S.C. §§ 1311, 1318, or 1344.

30. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates sections 301, 308, or 404 of the CWA, 33 U.S.C. § 1311, 1318, or 1344, or who violates any condition or limitation of an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$27,500 per day for each such violation.

GENERAL ALLEGATIONS

31. At the sites identified below, GHK constructed access roads and drilling pads for natural gas exploration and production. GHK often constructed drilling pads in this hilly and forested “Potato Hills” area of southeastern Oklahoma by first clearing the area and

then cutting a nearby hillside to generate fill material for the pad construction, leaving steep banks devoid of trees or vegetation, and resulting in erosion and sedimentation of nearby streams.

32. By generating fill material on-site, rather than hauling material in, GHK created steep banks adjacent to the pad sites. Much of the storm water that naturally flows over these cut banks, as well as over the other cleared, graded, and excavated areas at the site, is neither diverted nor conveyed in any manner. As a result, these flows cause erosion and sediment transport, the discharge of suspended solids into nearby waterways, and a build-up of silt and sediments in receiving lakes and streams. These discharges can affect the health and quality of nearby waterways, and may potentially contaminate drinking water and pollute recreational waters.

FIRST CLAIM FOR RELIEF

Failure to Obtain and Comply with an NPDES Storm Water Permit

33. Paragraphs 1 through 32 are realleged and incorporated herein by reference.

34. During construction of the following eight (8) oil and gas exploration and/or production sites in Latimer and Pushmataha counties (the "Identified Sites"), GHK, or persons acting on its behalf, engaged in construction activities disturbing five or more acres and failed to obtain coverage under the General Permit as required or to follow the requirements set forth therein:

- Keyse #1-9 in Pushmataha County, Oklahoma
- Koopman #1-2 in Pushmataha County, Oklahoma
- London #2-6 in Pushmataha County, Oklahoma

- Mary Ratcliff #2-33 in Latimer County, Oklahoma
- Morgan #1-5 in Pushmataha County, Oklahoma
- Sinclair #2-4 in Pushmataha County, Oklahoma
- Thompson #1-4 in Pushmataha County, Oklahoma, and
- Wigington #1-1 in Pushmataha County, Oklahoma.

35. As a result of the construction activity at each of the Identified Sites, GHK discharged pollutants, including eroded soil, sediment, and other substances associated with earth-disturbing activities, into waters of the United States.

36. The “construction activity, including clearing, grading, and excavation” activities that were undertaken by or on behalf of GHK at each of the Identified Sites disturbed five or more acres. As such, the construction activities are considered “industrial activities,” within the meaning of 40 C.F.R. § 122.26(b)(14)(x).

37. The ditches, gullies, and channels at each Identified Site discharged pollutants and constituted “point source[s],” as that term is defined at section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

38. At each Identified Site, GHK, or persons acting on its behalf, discharged eroded soil, sediment, and other substances associated with earth disturbing activities, which are “pollutants” as defined by section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2, into “waters of the United States” within the meaning of section 502 of the CWA, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.

39. At all times relevant to this action, GHK leased, operated, or otherwise controlled each Identified Site, and was therefore required to obtain NPDES permit coverage for

discharges of pollutants associated with industrial activities at the site, and to comply with all requirements and conditions of the Act, its regulations, and the applicable permit, including the development and implementation of a Storm Water Pollution Prevention Plan. See CWA § 402, 33 U.S.C. § 1342, 40 C.F.R. Part 122, Reissued General Permit, Part V, 63 Fed. Reg. 36490, 36502 (July 6, 1998).

40. At no time has GHK submitted a Notice of Intent to obtain coverage under the General Permit, or otherwise applied for an individual or group NPDES permit, for construction activities at any of the Identified Sites, as required by the applicable regulations and the General Permit. See 40 C.F.R. § 122.26(c); 63 Fed. Reg. 36490 (July 6, 1998).

41. At no time has GHK submitted or implemented a SWPPP at any of the Identified Sites, as required by the General Permit. See 63 Fed. Reg. 36490 (July 6, 1998).

42. At each Identified Site, GHK and/or persons acting on its behalf discharged pollutants into waters of the United States without NPDES permit coverage, in violation of section 301 of the CWA, 33 U.S.C. § 1311.

43. GHK's discharge of pollutants into waters of the United States at each of the Identified Sites without an NPDES permit constitutes a violation of the Clean Water Act.

SECOND CLAIM FOR RELIEF

Discharge into Wetlands Without a § 404 Permit

44. Paragraphs 1 through 32 are realleged and incorporated herein by reference.

45. During the construction of five (5) oil and gas exploration and/or production sites listed below ("Wetland Sites"), GHK, or persons acting on its behalf, used heavy

earthmoving equipment to move dredged or fill material into waters of the United States, effectively re-routing certain streams to facilitate drill pad construction, without obtaining a permit pursuant to §404 of the Act, 33 U.S.C. §1344.

- Morgan #1-5 in Pushmataha County, Oklahoma
- Pettit #1-3, located in Pushmataha County, Oklahoma
- London #2-6 in Pushmataha County, Oklahoma
- Don Stevens #4-33, located in Latimer County, Oklahoma, and
- Statler #2-4, located in Pushmataha County, Oklahoma.

46. The dredged or fill material that GHK, and/or persons acting on its behalf, caused to be discharged at the Wetland Sites includes, among other things, dirt, spoil, rock and sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

47. GHK, and/or persons acting on its behalf, used mechanized land-clearing and earth-moving equipment to accomplish the discharges. This equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

48. GHK did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344, for any of the Wetland Sites.

49. GHK leased, operated, or otherwise controlled the land at each of the Wetland Sites on which each unauthorized discharge of dredged or fill material into waters of the

United States occurred. GHK conducted, contracted for, supervised and/or otherwise controlled the unauthorized activities described herein.

50. Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States, including wetlands, at each of the Wetland Sites.

51. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

52. Unless enjoined, GHK is likely to continue to discharge dredged or fill material into and/or to allow dredged or fill material to remain in the Wetland Sites in violation of CWA section 301, 33 U.S.C. § 1311.

THIRD CLAIM FOR RELIEF

Failure to Respond Fully to § 308 Information Request

53. Paragraphs 1 through 32 are realleged and incorporated herein by reference.

54. Because 40 C.F.R. § 122.26(b)(14)(x) defines the term “storm water discharge associated with industrial activity” to include storm water discharges from construction activities that result in a disturbance of five or more acres, EPA frequently uses its information gathering authority under § 308(a) of the Act, 33 U.S.C. § 1318, to obtain information about the size of a construction area and other relevant details.

55. Whenever necessary to carry out the objectives of the Act, including the determination of whether a person is in violation of certain limits or prohibitions of the Act, section 308(a) of the Act, 33 U.S.C. § 1318(a), authorizes EPA to require the owner or operator

of any point source to, *inter alia*, establish and maintain records, make reports, sample effluents, conduct monitoring activities, and “provide such other information as he may reasonably require.” Section 308(a)(A), 33 U.S.C. §1318(a)(A).

56. On January 3, 2001, EPA issued to GHK a section 308 Information Request, seeking information about GHK’s construction activities at sites in the State of Oklahoma. Specifically, this request sought, *inter alia*, information about the sites at which GHK was involved in construction activities disturbing five acres or more.

57. On January 30, 2001, GHK submitted an incomplete response to the section 308 Information Request that EPA issued in January, 2001.

58. On three subsequent occasions, in March, April, and May of 2001, EPA again issued requests for information pursuant to section 308 to GHK, clarifying and, in some respects, narrowing the earlier request. Except for attending a meeting with EPA in May, 2001, GHK failed to fully respond to these requests.

59. GHK’s failure to completely respond to EPA’s section 308 Information Request is a violation of section 308 of the CWA, 33 U.S.C. § 1318.

60. GHK leased, operated, or otherwise controlled each of the sites that were subject of the section 308 requests issued by EPA.

61. Each of the sites that were subject of the section 308 requests is a “point source,” as that term is defined at section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

62. GHK's continuing failure to respond fully to EPA's requests for information made pursuant to section 308 constitutes an ongoing violation of section 308 of the CWA, 33 U.S.C. § 1311(a).

63. Pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b), Plaintiff may commence a civil action for appropriate relief, including a temporary or permanent injunction, when any person is in violation of section 308 of the Act, 33 U.S.C. § 1318.

64. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates section 308, 33 U.S.C. § 1318, shall be subject to a civil penalty not to exceed \$27,500 per day for each such violation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully requests that this Court order the following relief:

A. That Defendants restore and stabilize the Identified Sites to prevent further erosion and water contamination;

B. That Defendants be ordered to comply with the terms and conditions of applicable CWA permits during the construction of drilling sites in the future, including, among other things, the development and implementation of a Storm Water Pollution Prevention Plan and the application of best management practices to minimize or eliminate storm water discharges from the site;

C. That Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA;

D. That Defendants be enjoined to undertake measures, at Defendants' own expense and at the direction of the U.S. EPA, to effect complete restoration of the Morgan, London, Don Stevens, Petit, and Statler Sites, and/or to conduct off-site mitigation for irreversible environmental damage, as appropriate;

E. That Defendants be assessed, pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA sections 301(a), 404(a), and 308, 33 U.S.C. §§ 1311(a), 1344(a), and 1318;

F. That the United States be awarded costs and disbursements in this action; and

G. That this Court grant Plaintiff, the United States of America, such other relief as the Court may deem just and proper.

Respectfully submitted,

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